Peguam Negara Malaysia & Anor v Go Fu Seng and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-01(A)-321–06 OF 2021, P-01(A)-322–06 OF 2021 AND W-01(NCVC)(A)-191–04 OF 2021

KAMALUDIN MD SAID, AZIZAH NAWAWI AND NANTHA BALAN JJCA

24 MAY 2022

Citizenship — Operation of law, by — Declaration — Whether illegitimate child acquired father's citizenship by descent (jus sanguinis) and therefore qualified for Malaysian citizenship pursuant to art 14(1)(b) of Federal Constitution by reason of subsequent legal marriage of illegitimate child's parents — Whether court bound by doctrine of stare decisis to follow Federal Court's decision in CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236 — Federal Constitution art 14(1)(b) & s 1(a) Part II, Second Schedule — Law Reform (Marriage and Divorce) Act 1976 — Legitimacy Act 1961

There were three appeals before the Court of Appeal against the decision of the High Court in three separate originating summons applications in which the High Court granted declarations that the respondents were the citizens of Malaysia by operation of law pursuant to art 14(1)(b) of the Federal Constitution ('the FC') read with s 1(a), Part II, Second Schedule of the FC. The High Court's decision was anchored on the decision of the Court of Appeal in *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307 ('Madhuvita'). In *Madhuvita*, the court held that upon the legitimation of the parents' marriage, the relevant status of legitimacy of the child should be referenced to the time when the application for citizenship was made and not the illegitimate status at the time of birth. The common question arose in the present appeals was whether a child who was born in Malaysia, to a father who was a Malaysian citizen and the mother was a non-citizen, and where the parents subsequently registered their marriage under the Law Reform (Marriage and Divorce) Act 1976, was a Malaysian citizen by operation of law pursuant on art 14(1)(b) read together with s 1(a) Part II of the Second Schedule of the FC. Thus, the issue for the court's determination was whether by reason of the subsequent legal marriage of the illegitimate child's parents, that child acquired the father's citizenship by descent (jus sanguinis) and therefore qualified for Malaysian citizenship under the provisions of the FC.

Held, allowing the appeals and setting aside the decisions of the High Court with no order as to costs:

(1) The decisions of the High Court were anchored on the Court of Appeal's decision in *Madhuvita* but the latter was overruled by the majority decision of the Federal Court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236 ('CTEB'). In *CTEB*, the Federal Court clearly and unequivocally rejected the proposition that was established by the Court of Appeal in *Madhuvita* regarding the role of the order made under the Legitimacy Act 1961 or the subsequent legitimation of marriage of the parents for the purposes of determining the question whether a child had the requisite qualifications to attain citizenship by operation of law. The Federal Court's decision in *CTEB* was delivered after the High Courts had rendered their decision in each of the applications which were now on appeal before this court. It was common ground between all the counsels who appeared in the present appeals that in light of the Federal Court's decision in *CTEB*, *Madhuvita* was no longer good law. The court in the present appeals was therefore bound by the doctrine of stare decisis to follow the Federal Court's decision in *CTEB*. The court held that acquisition of citizenship by operation of law required the fulfilment of the requisite conditions at the time of birth and not thereafter. Therefore, it was the illegitimate status at the time of birth which was relevant and the subsequent legitimation of marriage of the parents did not alter the earlier illegitimate status of the child and in such circumstances, the illegitimate child would follow the mother's citizenship (see paras 6–8, 38–39, 43–44 & 47).

[Bahasa Malaysia summary

Terdapat tiga rayuan di hadapan Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi dalam tiga permohonan saman pemula yang berasingan di mana Mahkamah Tinggi memberikan pengisytiharan bahawa responden adalah warganegara Malaysia melalui kuat kuasa undang-undang menurut perkara 14(1)(b) Perlembagaan Persekutuan ('PP') dibaca dengan s 1(a), Bahagian II, Jadual Kedua PP. Keputusan Mahkamah Tinggi bersandarkan pada keputusan Mahkamah Rayuan di dalam kes *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307 ('Madhuvita'). Di dalam kes *Madhuvita*, mahkamah memutuskan bahawa apabila perkahwinan ibu bapa disahkan, status keabsahan kanak-kanak yang berkaitan harus dirujuk pada masa permohonan kewarganegaraan dibuat dan bukannya status tidak sah pada masa kelahiran. Persoalan lazim yang timbul dalam rayuan-rayuan ini ialah sama ada seseorang anak yang dilahirkan di Malaysia, kepada bapa yang merupakan warganegara Malaysia dan ibunya bukan warganegara, dan di mana ibu bapa tersebut kemudiannya mendaftarkan perkahwinan mereka di bawah Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976, adalah warganegara Malaysia melalui kuat kuasa undang-undang menurut perkara 14(1)(b) dibaca bersama s 1(a) Bahagian II Jadual Kedua PP. Oleh itu, isu untuk penentuan

A mahkamah adalah sama ada atas sebab perkahwinan berikutnya yang sah diantara ibu bapa anak tidak sah taraf, anak tersebut memperoleh kewarganegaraan bapa secara keturunan (jus sanguinis) dan oleh itu layak untuk mendapat kewarganegaraan Malaysia di bawah peruntukan PP.

B **Diputuskan**, membenarkan rayuan-rayuan dan mengenepikan keputusan-keputusan Mahkamah Tinggi tanpa perintah berkenaan kos:

(1) Keputusan-keputusan Mahkamah Tinggi telah disandarkan pada keputusan Mahkamah Rayuan di dalam kes *Madhuvita* tetapi keputusan
C dalam kes *Madhuvita* telah ditolak oleh keputusan majoriti Mahkamah Persekutuan dalam *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236 ('CTEB'). Dalam *CTEB*, Mahkamah Persekutuan dengan jelas dan tegas menolak penemuan yang telah diputuskan oleh Mahkamah Rayuan di dalam kes *Madhuvita* berhubung
D peranan perintah yang dibuat di bawah Akta Kesahtarafan 1961 atau pengesahan perkahwinan ibu bapa yang berikutnya bagi tujuan menentukan persoalan sama ada seseorang anak itu mempunyai kelayakan yang diperlukan untuk mendapat kewarganegaraan melalui kuat kuasa undang-undang. Keputusan Mahkamah Persekutuan dalam
E *CTEB* telah disampaikan selepas Mahkamah Tinggi membuat keputusan dalam setiap permohonan yang kini dalam rayuan di hadapan mahkamah ini. Semua peguam yang terlibat dalam rayuan semasa bersetuju bahawa berdasarkan keputusan Mahkamah Persekutuan dalam *CTEB*, *Madhuvita* bukan lagi undang-undang yang terpakai. Oleh itu,
F mahkamah dalam rayuan-rayuan ini terikat dengan doktrin stare decisis untuk mengikuti keputusan Mahkamah Persekutuan dalam kes *CTEB*. Mahkamah berpendapat bahawa pemerolehan kewarganegaraan melalui kuatkuasa undang-undang memerlukan pemenuhan syarat-syarat yang diperlukan pada masa kelahiran dan bukan selepas itu. Oleh itu, status
G tidak sah taraf pada masa kelahiran adalah relevan dan pengesahan perkahwinan ibu bapa yang berikutnya tidak mengubah status tidak sah taraf anak tersebut dan dalam keadaan sedemikian, kewarganegaraan anak tidak sah taraf tersebut akan mengikut kewarganegaraan ibunya (lihat perenggan 6–8, 38–39, 43–44 & 47).]

H

Cases referred to

CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71; [2022] 1 CLJ 1; [2021] 1 LNS 1759; [2022] 1 MLRA 185, FC
I (refd)

CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236; [2021] 6 CLJ 471; [2021] 5 AMR 66, FC (folld)

CCC & Anor (kedua-duanya kanak-kanak yang menuntut melalui Chew Kean Yew bapa kandung mereka) v Ketua Pendaftaran Kelahiran dan Kematian

Malaysia and another case [2021] MLJU 1714; [2021] 1 LNS 1371, HC (refd)

Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors [2018] 1 MLJ 307; [2018] 4 CLJ 758; [2017] 8 AMR 436, CA (not folld)

Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child) [2017] 3 MLJ 308; [2017] 7 CLJ 33; [2018] 2 MLRA 406, CA (refd)

Legislation referred to

Federal Constitution arts 14(1)(b), 15A, 31, Second Schedule, Part II, s 1(a), (e), Part III, s 17

Law Reform (Marriage and Divorce) Act 1976

Legitimacy Act 1961 ss 4, 5

Appeal from: *CCC & Anor (kedua-duanya kanak-kanak yang menuntut melalui Chew Kean Yew bapa kandung mereka) v Ketua Pendaftaran Kelahiran dan Kematian Malaysia and another case* [2021] MLJU 1714 and Originating Summons No WA-24NCVC-1572–07 of 2019 (High Court, Kuala Lumpur)

Rahazlan Affandi bin Abdul Rahim (Attorney General's Chambers) in Civil Appeal Nos P-01(A)-321–06 of 2021 and P-01(A)-322–06 of 2021 for the appellants.

Mohd Izhanudin bin Alias (with Arina Azmin bt Ahmad Marzuki) (Attorney General's Chambers) in Civil Appeal No W-01(NCVC)(A)-191–04 of 2021 for the appellants.

Andy Ooi Keng Liang (Shariffah, Ooi & Co) in Civil Appeal Nos P-01(A)-321–06 of 2021 and P-01(A)-322–06 of 2021 for the respondent.

Vigneswaran a/l Raju (with Roshini Ramasamy) (The Chambers of Waran) in Civil Appeal No W-01(NCVC)(A)-191–04 of 2021 for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] The common question in the appeals before us is whether a child who is born in Malaysia, to a father who is a Malaysian citizen and the mother is a non-citizen (foreigner), and where the parents subsequently registered their marriage under the Law Reform (Marriage and Divorce) Act 1976, is a Malaysian citizen by operation of law pursuant on art 14(1)(b) read together with s 1(a), Part II of the Second Schedule of the Federal Constitution ('the FC'). Hence, the issue is whether by reason of the subsequent legal marriage of the illegitimate child's parents, that child acquires the father's citizenship by

descent (*jus sanguinis*) and therefore qualifies for Malaysian citizenship under the provisions of the FC.

[2] There are three appeals before us and they shall be referred to collectively as 'the appeals'. They are:

(a) Civil Appeal No P-01(A)-321–06 of 2021 ('Appeal 321');

(b) Civil Appeal No P-01(A)-322–06 of 2021 ('Appeal 322'); and

(c) Civil Appeal No W-01(NCVC)(A)-191–04 of 2021 ('Appeal 191').

[3] These appeals are directed at the decision of the High Court in three separate originating summons applications whereby rulings were made in favour of the applicants (respondents before us). The High Courts granted declarations in favour of the respondents who were declared to be citizens of Malaysia by operation of law pursuant to art 14(1)(b) of the FC read with s 1(a) Part II, Second Schedule of the FC.

[4] In each of the cases before the High Court, the rulings in favour of the respondents were anchored on the decision of the Court of Appeal in *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307; [2018] 4 CLJ 758; [2017] 8 AMR 436 (CA) ('Madhuvita').

[5] Essentially in *Madhuvita*, the Court of Appeal ruled that the subsequent legitimation of the marriage of the illegitimate child's parents altered the status of that child and that the child is no longer regarded as illegitimate when seeking citizenship by operation of law. According to the Court of Appeal upon the legitimation of the parents' marriage, the relevant status of legitimacy of the child should be referenced to the time when the application for citizenship is made and not the illegitimate status at the time of birth.

[6] However, the *Madhuvita* jurisprudence was short-lived as the correctness of the Court of Appeal's decision was doubted and was overruled by the majority decision of the Federal Court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236; [2021] 6 CLJ 471; [2021] 5 AMR 66 (FC) ('CTEB').

[7] The Federal Court's decision in *CTEB* was delivered after the High Courts had rendered their decision in each of the applications where are now before us on appeal. It was common ground between all the counsel who appeared before us that in light of the Federal Court's decision in *CTEB*, *Madhuvita* is *no longer good law*. Thus, when the matter came before us, the legal position in relation to an illegitimate child's entitlement to Malaysian

citizenship consequent upon the subsequent registration of the marriage between the Malaysian father and non-citizen mother, was as stated by the majority decision of the Federal Court in *CTEB*.

[8] Thus, it is the illegitimate status at the time of birth which is relevant and the subsequent legitimation of marriage of the parents did not alter the earlier illegitimate status of the child and in such circumstances, the illegitimate child will follow the mother's citizenship. These issues are elaborated further in this judgment. Consequently, in light of the Federal Court's ruling in *CTEB*, we found ourselves bound by the doctrine of *stare decisis* and were compelled to and did allow the appeals.

APPEAL 321 (BRIEF FACTS)

[9] In Appeal 321 the facts are as follows. The respondent, Go Fu Seng was born on 19 September 1999 in Malaysia. His biological father, Go Chin Au is a Malaysian citizen. Go Chin Au was married in Indonesia to Mdm Elisabeth Elbertus ('Mdm Elizabeth'), an Indonesian citizen. The marriage in Indonesia took place on 20 March 1999. Mdm Elisabeth later attained permanent resident status in Malaysia.

[10] Go Chin Au and Mdm Elisabeth Elbertus subsequently got married in Malaysia and the marriage was registered in Malaysia on 29 December 1999. On 3 October 2019, Go Fu Seng obtained an order of legitimacy pursuant to ss 4 and 5 of the Legitimacy Act 1961 via Penang High Court Originating Summons No PA-3–07 of 2019 which ordered that:

> Plaintif iaitu Go Fu Seng lelaki yang dilahirkan pada 19hb September, 1999 diisytiharkan sebagai anak sahtaraf kepada Go Chin An (No KP: 730706–08–6219) dan Elisabeth Elbertus (No K/P:720725–61–5068) mulai 29.12.1999 ...

[11] Go Fu Seng then applied for citizenship pursuant to art 15A of the FC, but there was no response. He then filed an originating summons and sought to obtain an order directing the Ketua Pendaftar Kelahiran dan Kematian Malaysia to register him as a citizen of Malaysia. By an order dated 26 April 2021, the High Court allowed the application and ordered as follows:

> ... bahawa Ketua Pendaftar Kelahiran dan Kematian Malaysia mendaftarkan semula taraf kewarganegaraan Go Fu Seng sebagai warganegara dengan tiada perintah mengenai kos.

APPEAL 322 (BRIEF FACTS)

[12] In Appeal 322, the facts were as follows. The respondents, CCH and CCC were born in Malaysia on 30 October 2011 and 3 November 2012

respectively. The respondents are the biological children of Chew Kean Yew ('CKY'). CKY is a Malaysian citizen. The respondents' biological mother is Mdm Zeng Xiaohua ('Mdm Zeng'). Mdm Zeng is a citizen of the Peoples Republic of China. CKY and Mdm Zeng were lawfully married in Malaysia on 5 December 2012. By an order of the High Court via Originating Summons No PA-34–1–04 of 2019 dated 1 August 2019 made pursuant to s 4 and s 5 of the Legitimacy Act 1961, it was declared as follows:

> Plaintif Pertama iaitu CCC dan Plaintif Kedua CCH masing masing kanak-kanak perempuan yang lahir pada 3.11.2012 dan 30.10.2011 disytiharkan sebagai anak-anak sahtaraf kepada Chew Kean Yew (No KP: 750201–07–5387) dan Zheng Xiaohua (No Passport: E02789214) mulai 5.12.2012;

[13] The respondents applied for citizenship under art 15A of the FC but there was no response from the Malaysian authorities. The respondents then filed an originating summons and sought the following reliefs:

> (a) Bahawa Ketua Pendaftar Kelahiran dan Kematian Malaysia mendaftarkan semula kelahiran CCC dan CCH sebagai orang yang sah taraf dan menamakan Chew Kean Yew (No KP:750201–07–5387) sebagai bapa bilogikal (biological father) dan Zheng Xiaohua (No Passport: E02789214) sebagai ibu bilogikal (biological mother);
>
> (b) Bahawa Ketua Pendaftar Kelahiran dan Kematian Malaysia mendaftarkan semula taraf kewarganegaraan CCC dan CCH sebagai warganegara Malaysia dan
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> (c) Lain-lain perintah yang dianggap wajar, layak dan suai manfaat oleh Mahkamah Yang Mulia ini.

[14] By an order dated 26 April 2021, the High Court allowed the application and ordered as follows:

> Bahawa Ketua Pendaftar Kelahiran dan Kematian Malaysia mendaftarkan semula taraf kewarganegaraan CCC dan CCH sebagai warganegara Malaysia dengan tiada perintah mengenai kos.

APPEAL 191 (BRIEF FACTS)

[15] In Appeal 191, the facts were as follows. The respondent, Mohanasengri was born in Malaysia on 9 November 1992. The respondent's biological father is Mohan Rao a/l S Daliah ('Mr Mohan Rao'), a Malaysian citizen. The respondent's mother is Mdm Navamoney d/o PS Karuppiah ('Mdm Navamoney'). Mdm Navamoney is not a Malaysian citizen. She holds a Certificate of Identity No S 1478608B of the Republic of Singapore. Mr Mohan Rao's marriage to Mdm Navamoney was subsequently registered in Malaysia on 28 February 2005. The respondent applied for citizenship under art 15A of the FC but was unsuccessful. the respondent then filed the

originating summons ('OS') seeking various relief in regards to her status as a citizen.

[16] The reliefs sought in the OS was as follows:

(a) Suatu Deklarasi bahawa Plaintif adalah anak yang sah kepada Mohan Rao a/l S Daliah (bapa), seorang warganegara Malaysia dan Navamoney d/o PS Karuppiah (ibu) seorang warganegara Singapura;

(b) Plaintif adalah seorang warganegara Malaysia;

(c) Ketua Pendaftar Kelahiran dan Kematian Malaysia mendaftarkan semula Sijil Kelahiran Plaintif dengan taraf warganegara di mana Mohan Rao a/l S Daliah dan Navamoney d/o P S Karuppiah didaftarkan masing-masing sebagai bapa dan ibu yang sah kepada Plaintif;

(d) Plaintif telah bermastautin di Persekutuan atau bahagiannya yang berkaitan untuk tempoh yang pada agregatnya berjumlah tidak kurang daripada sepuluh tahun dalam masa dua belas tahun sebelum pemfailan Saman Pemula ini;

(e) Secara alternatifnya, Plaintif boleh diperakukan sebagai warganegara Malaysia secara naturalisasi;

(f) Kos permohonan ini dan kos sampingannya ditanggung oleh Plaintif;

(g) Kebebasan untuk Plaintif terus memohon kepada Jabatan Pendaftaran Negara Malaysia dan Kementerian Dalam Negeri; dan

(h) Sebarang relif lain yang difikirkan patut dan suaimanfaat oleh Mahkamah Yang Mulia ini.

[17] By an order dated 29 March 2021, the High Court allowed the application and granted the following orders:

1. Plaintif adalah anak yang sah kepada Mohan Rao a/l S Daliah (bapa), seorang warganegara Malaysia dan Navamoney d/o P S Karuppiah (ibu) seorang warganegara Singapura;

2. Plaintif adalah seorang warganegara Malaysia;

3. Ketua Pendaftar Kelahiran dan Kematian Malaysia mendaftarkan semula Sijil Kelahiran Plaintif dengan taraf warganegara di mana Mohan Rao a/l S Daliah dan Navamoney d/o P S Karuppiah didaftarkan masing-masing sebagai bapa dan ibu yang sah kepada Plaintif;

4. Kos permohonan ini dan kos sampingannya ditanggung oleh Plaintif.

[18] From the brief (undisputed) facts as narrated above, it is clear that there is a common theme that straddles the three appeals and it is this. The applicants (respondents before us) who moved the High Court for the requisite orders in regard to their status as citizens were all born in Malaysia and were illegitimate

at the time of their birth. Their fathers are Malaysian citizens whereas their mothers were foreigners. The parents of the respective applicants who were born illegitimate in Malaysia, subsequently registered their marriage in Malaysia.

[19] In the case of the respondents in Appeal Nos 331 and Appeal 332, they had also obtained orders under the Legitimacy Act 1961 to legitimise their birth via the statutory provisions. In Appeal 191, there was no order under the Legitimacy Act 1961. However, via prayer (a) of the OS, the respondent sought a declaration that she is the lawful child of Mr Mohan Rao and Mdm Navamoney.

THE HIGH COURT

[20] For Appeals 321 and 322 the learned judicial commissioner's grounds for allowing the applications are as follows (see *CCC & Anor (kedua-duanya kanak-kanak yang menuntut melalui Chew Kean Yew bapa kandung mereka) v Ketua Pendaftaran Kelahiran dan Kematian Malaysia and another case* [2021] MLJU 1714; [2021] 1 LNS 1371):

> [26] The applicants say that they are to be considered 'legitimate' for the purposes s 1(a) of Part II (Citizenship by Operation of Law of Persons born of or after Malaysia Day) of the Second Schedule, read with section 17 (Interpretation) of Part III of the Second Schedule, because it is the applicant's current status at the time of application that matters. As they were legitimated soon after their birth, they are, thus, Malaysian citizens by operation of law.
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> [27] the respondents take a contrary view. They say that it is the applicant's status at the time of birth that matters. The fact that they were subsequently legitimated is irrelevant. They are, thus, not Malaysian citizens by operation of law.
>
> Conflicting Authorities
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> [28] At the time of hearing of this case, there were two conflicting decisions of the Court of Appeal on this point.
>
> Court of Appeal in *Madhuvita*
>
> [29] The Applicants relied on the Court of Appeal's decision in *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307; [2018] 4 CLJ 758 ('Madhuvita'). The judgment was delivered on 2 November 2017 by Justice Mary Lim JCA (as she was then), with Justice Tengku Maimun Tuan Mat JCA (as she was then) and Justice Kamardin Hashim JCA concurring.
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> [30] On this point, the court held that it was not the legitimacy status at the time of birth, but at the current status, that mattered. This is what Justice Mary Lim JCA said:
>
> > [59] ... it accords with and comprises the two basic elements for citizenship, *jus soli* and *jus sanguinis*. Since it is an uncontroverted and an admitted fact by the respondents that Augustine a/l Lourdsamy is the biological father of the

appellant, Augustine a/l Lourdsamy is the father and thereby parent of the appellant, and Augustine a/l Lourdsamy is a citizen of Malaysia at the time of the appellant's birth, the terms of art 14(1)(b) read with s 1(a) of Part II, Second Schedule are met. A

[60] We further find that the fact that Augustine a/l Lourdsamy and Margaret Luisa Tan, the biological parents of the appellant were not married to each other at the time of the appellant's birth does not alter or diminish their capacities as parents of the appellant. B

[61] The next consideration is whether the above conclusions are now qualified by the interpretation provisions in Part III of the Second Schedule. It is our respectful view that it is not. To recapitulate, s 17 provides that in relation to a person who is illegitimate, a reference to that person's father or parent is to be construed as a reference to the person's mother. The reason why we say that s 17 does not alter the above interpretation is because s 17 only applies to a person who is illegitimate. Section 17 is drafted in the present tense and it is the prevailing status of legitimacy or illegitimacy which is the relevant consideration. C D

[62] In that regard, the appellant is clearly, not illegitimate. She is born of parents who were not married to each other at the time of her birth. She is known as a child born out of wedlock. However, she is no longer illegitimate by reason of legitimation by the subsequent marriage of her parents. E

[63] The Legitimacy Act 1961 (Act 60) is an Act passed by Parliament to provide for the legitimation of children born out of wedlock. Although we are cautious to ensure that we cannot and do not use a subsidiary piece of legislation such as Act 60 to interpret the Federal Constitution, we find the reference to Act 60 appropriate in order to determine whether the appellant is illegitimate. The Federal Constitution has not defined the meaning of 'illegitimate'. The ordinary meaning of illegitimate person would be one who is born out of wedlock or is the issue of parents who were not married to one another at the time of the person's birth. F

[64] In the present appeal, the parents of the appellant have married each other since 23 January 2006. Their marriage has been properly solemnised and recognised under s 3 of Act 60. Where that happens, s 4 of Act 60 applies. Section 4 reads as follows: G

> Subject to section 3, where the parents of an illegitimate person marry or have married one another, whether before or after the prescribed date, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Malaysia, render that person, if living, legitimate from the prescribed date or from the date of the marriage, whichever is the later. H

[65] With the clear terms of s 4, the appellant is rendered legitimate by the subsequent marriage of her parents and that legitimation is from the date of the marriage, that is, from 23 January 2006. From the language and terms of s 17, the appellant's legitimacy or illegitimacy is questioned at the time of the consideration of the application, and not some other point in time. I

A [66] As a legitimate person from 23 January 2006, s 17 does not apply. Section 17 only applies where the person is illegitimate. Since there is legitimation of the appellant, s 17 does not apply. As a legitimate person, the appellant is entitled to rely on her father's citizenship in which case, the appellant has quite clearly fulfilled the requirements of art 14(1)(b) read with s 1(a) of Part
B II of the Second Schedule.

[67] We must add that the appellant's case does not fall under s 5 of Act 60 as the appellant was not claiming to be a legitimate child or be legitimated by certain conditions under s 6. In the case of the appellant, s 4 applies.

C Court of Appeal in *Chan Tai Ern*

[31] The respondent relied on the Court of Appeal's decision in *Chan Tai Ern Bermillo (a minor bringing this action through his biological father and next friend, the second plaintiff) & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2020] 3 MLJ 634; [2020] 4 CLJ 597 ('Chan Tai Ern'). The judgment was
D delivered two years after *Madhuvita* on 14 February 2020 by Justice Zaleha Yusof JCA (as she was then), with Justice Abdul Rahman Selbi JCA (as he was then) and Justice Rhodzariah Bujang JCA (as she was then) concurring.

[32] On this same point, the court this time held that it was the legitimacy status at the time of birth, and not otherwise, that mattered. This is what Justice Zaleha
E Yusof JCA said:

[4] Reading the above-cited provisions, we find there will not be any problem if a child is born legitimate to a father who is a Malaysian citizen even if he is born outside the Federation. But in the instant appeal, the child was born out of wedlock. He was illegitimate at the time of his birth. So there comes the
F problems. Section 17 of Part III of the Second Schedule specifically stipulates that 'father' in relation to a person who is illegitimate refers to his mother.

[5] As alluded to earlier, the mother of the first appellant is a citizen of the Republic of the Philippines. Hence one of the qualifications of the citizenship by operation of law that the father, in this case, the mother, is a Malaysian citizen at
G the time of the first appellant's birth, by a plain reading of the provisions of the FC, has not been fulfilled.

[6] However, learned counsel for the appellants argued that the first appellant's status had been legitimated since his biological parents subsequently married. Hence the first appellant is not illegitimate and reference to 'person's father' or
H 'parent' in s 17 of Part III are not to be construed as reference to his Filipino mother. Learned counsel found support in the provision of ss 3, 4 and 9 of the Legitimacy Act 1961 (' the LA 1961'); which for ease of reference are reproduced below:

...

I [7] Learned counsel for the appellants contended that the operation of s 3 of the LA 1961 should be retrospective and once the marriage between the parents has been registered or solemnised, the person is granted the new status of being the legitimate child of their parents. He further contended that by virtue the present tense is used in s 17 of Part III of the Second Schedule, and since the first

appellant's application for his citizenship is made at the present time, after the marriage of his parents, therefore he would be entitled to claim his citizenship.

[8] The learned senior federal counsel (SFC) for the respondent argued that while it is true that an illegitimate child may be legitimated under s 3 of the LA 1961, the subsequent marriage of his parents would not change the birth status of the child. Section 4 of the LA 1961 deems the child as legitimate from the date of the marriage, hence the marriage does not have the effect of altering the child's birth status which is illegitimate. She further submitted that s 9 of the LA 1961 only deems as if the illegitimate child had been born legitimate for the purpose of the rights and obligations of maintenance and support of himself, claims for damages, compensation, allowance, and benefit or otherwise.

She found support in *Foo Toon Aik v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573; [2012] 4 CLJ 613; *Chin Kooi Nah (suing by herself and as next of kin to Chin Jia Nee, an infant) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717; [2016] 1 CLJ 736 and *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor* [2017] 3 MLJ 308; [2017] 7 CLJ 33.

[9] We had perused the grounds of judgment of the learned High Court judge. We found the submissions of the parties at the High Court were similar with the submissions before us. We found the learned High Court judge's reasons in dismissing the originating summons were in line with the submissions put forward by the learned SFC. His Lordship had also referred to the same three cases referred to us by the learned SFC. His Lordship in para [69] of the grounds of judgment concluded as follows:

> ... Thus, for purposes of s 17 Part III of the Second Schedule of the Federal Constitution, Pi's status is the status that obtained at the time of birth, which means that he was illegitimate at that time, and since his mother, Maylene was a non-citizen, he accordingly lacked the requisite qualification for purposes of acquiring citizenship 'by operation of law' under art 14(1)(b) of the Federal Constitution. This disposes off the main issue in this case.

[10] Having perused the grounds of judgment of the learned High Court judge and considered the submission of the party before us, we found no reason to depart from the decision of the learned High Court judge. With due respect to learned counsel for the appellants, we found the wording of s 1(b) of Part II of the Second Schedule is very clear. It talks about every person born outside the Federation 'whose father as at the time of the birth a citizen'. The emphasis is 'at the time of the child's birth'. With due respect to learned counsel of the appellants, the legitimacy of the child under ss 3 and 4 of the LA 1961 cannot be retrospective as s 4 of the same clearly states that the child is rendered legitimate 'from the prescribed date or from the date of the marriage, whichever is the later'.

[11] It means the child is only deemed legitimate on the date of the marriage of his parents and not from the date of his birth.

A [33] There were, thus, two conflicting decisions of the Court of Appeal on this point. At the time of the hearing of these applications, I was informed by counsel that *Chan Tai Ern*was on appeal to the Federal Court but had yet to be heard. I, therefore, did not have the benefit of the Federal Court's judgment when deciding the matter.

B DECISION

[34] After due consideration, I followed the precedent set by the Court of Appeal in *Madhuvita*. I found the rationale there, which I have already set out above, more persuasive and adopted that view that the applicants, having been legitimated, were Malaysian citizens by operation of law.

C [35] For the above reasons, I allowed the applicants' respective applications.

[21] Turning now to Appeal 191, the learned judge of the High Court premised his ruling in favour of the respondent (Mohanasengri) on the D following grounds. The judge said:

LATARBELAKANG

[2] Plaintif adalah anak kepada Mohan Rao a/l S Daliah (bapa), seorang warganegara Malaysia dan Navamoney a/p PS Karuppiah (ibu) seorang warganegara Singapura. Semasa plaintif dilahirkan ibu bapa plaintif tidak E berkahwin. Plaintif dilahirkan di luar pernikahan (out of vedlock) pada 9 September 1992 (eksh 'MS1'). Namun, ibu bapa plaintif kemudiannya telah mengesahkan dan mendaftar perkahwinan mereka mengikut undang-undang Negara ini (Law Reform (Marriage and Divorce) Act, 1976) pada 24 April 2006 (eksh 'MS4').

F Persoalan/Isu

[4] Isu utama untuk diputuskan adalah: 'Sama ada status seorang kanak-kanak bagi tujuan perkara 14(1)(b) Perlembagaan Persekutuan diputuskan pada masa kelahiran (*at the time of the birth*) atau pada masa permohonan bagi kerakyatan dibuat (*at the time of the application of citizenship*)?'

G *Keputusan Mahkamah*

[5] Pada 29 March 2021, setelah meneliti keseluruhan kertas kausa yang berkenaan dan setelah menimbang hujahan bertulis yang dikemukakan oleh peguam plaintif (pada ketika itu) dan hujahan balasan peguam kanan persekutuan (PKP) terpelajar, saya memutuskan plaintif berjaya dalam permohonan beliau.

H [6] Dengan hormatnya, saya tidak dapat bersetuju dengan hujahan peguam kanan persekutuan terpelajar bahawa Perlembagaan Persekutuan Negara kita menghalang seorang kanak-kanak luar nikah dari ibu bukan warganegara untuk mendapat kerakyatan melalui operasi undang-undang.

I [7] Pada masa permohonan plaintif didengar dan diputuskan, terdapat dua Mahkamah Rayuan Malaysia yang diketengahkan dan dirujuk kepada mahkamah ini yang melibatkan isu yang serupa/sama dengan kes di hadapan mahkamah ini iaitu, kes *Madhuvita Janjara Augustin (Suing Through Next Friend, Margeret Louisa Tan) v Augustin Lourdsamy & Ors* [2018] 1 MLJ 307; [2018] 4 CLJ 758 dan *Chan Tai Ern Bermillo (a minor bringing this action through his biological father and next*

friend, the second plaintiff) & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2020] 3 MLJ 634; [2020] 4 CLJ 579.

[8] Setelah menimbang kedua-dua kes tersebut, saya lebih bersetuju dengan dapatan undang-undang dan keputusan bagi kes *Madhuvita Janjara Augustin*. Pada hemat saya, status seorang kanak kanak bagi tujuan perkara 14(1)(b) PP seharusnya diputuskan pada masa permohonan bagi kerakyatan dibuat dan bukannya semasa kelahiran beliau. Atas alasan di atas, permohonan plaintif dibenarkan.

KEDUDUKAN UNDANG-UNDANG TERKINI

[9] Namun, berdasarkan kepada keputusan terkini oleh Mahkamah Persekutuan dalam kes Civil Appeal No 01(i)-34–10/2019(W) bagi rayuan kes *Chan Tai Ern Bermillo* yang membenarkan rayuan oleh kerajaan pada 28 Mei 2021 di mana YAA Rohana bt Yusof PMR, memutuskan:

> [3] All decided and reported cases on this issue are decisions of the High Court and the Court of Appeal. These decisions are in chorus (except for one decision of the COA in *Madhuvita*) in deciding that legitimisation of a child after his birth precludes him from being a citizen by operation of law under art 14 of the FC. This is because the provisions of the FC are clear that citizenship by operation of law must be determined at his birth, not after that.
>
> Section 17 clearly states that for a legitimate child he is to follow the citizenship of his mother which was presumed he had obtained because he was travelling on the passport issued by the Government of the Philippines and in this case that of the Philippines. It is not the function of the court to change that clear terms of the FC because the power to amend the FC lies in the Parliament, pursuant to art 159 of the FC and in adherence to the doctrine of separation of powers.

[10] Oleh kerana Mahkamah Persekutuan telah memutuskan bahawa kelayakan mendapatkan kerakyataan bagi seorang kanak-kanak adalah bergantung kepada taraf/status kanak-kanak tersebut semasa kelahiran dan bukan semasa permohonan kewarganegaraan, saya dengan hormatnya pulangkan kepada Mahkamah Rayuan yang mendengar rayuan ini untuk membuat keputusan yang sewajarnya bagi rayuan ini, berdasarkan prinsip stare decisis, memandangkan fakta dan isu kes kita ini adalah sama dengan kes *Chan Tai Ern Bermillo*.

FEDERAL CONSTITUTION

[22] The provisions of the FC that are relevant in regard to the question of citizenship by operation of law are as follows:

(a) art 14(1)(b):

> Article 14 Citizenship by operation of law.
>
> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and

(b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

(b) s 1(a) and (e) Part II, Second Schedule of the Federal Constitution:

(a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation;

...

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

(c) art 31 of the Federal Constitution:

Article 31 Application of Second Schedule.

Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part.

(d) s 17 Part III, Second Schedule of the Federal Constitution:

17. For the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such a person.

THE ISSUE

[23] Hence, the question is whether the subsequent marriage of the parents of the respective respondents in the appeals before us clothes them with the requisite qualification at the time of their application for citizenship so that they may be declared as citizens of Malaysia by operation of law. In *Madhuvita*, the Court of Appeal posited that it is the status of the *applicant at the time of the application for citizenship* and *not the illegitimate status at the time of birth*, which is germane.

[24] It may be noted that in *Madhuvita*, there was no order of legitimacy under the Legitimacy Act 1961. At any rate, the Court of Appeal in that case enunciated that upon the subsequent marriage of the parents, the child's previous illegitimate status is no longer relevant for the purposes of determining whether that child is a citizen by operation of law per art 14(1)(b) of the FC read with s 1(a) Part II, Second Schedule of the FC.

[25] The relevant parts of the Court of Appeal's judgment are found in paras [62] to [68] of the judgment. For present purposes, the Court of Appeal's ruling is summarised and it reads (per CLJ Report) as follows:

(4) The appellant was born of parents who were not married to each other at the time of her birth and was known as a child born out of wedlock. However, she was no longer illegitimate by reason of legitimation by the subsequent marriage of her

parents. Their marriage had been properly solemnised and recognised under s 3 of the Legitimacy Act 1961 ('the Act'). With the clear terms of s 4 of the Act, the appellant was rendered legitimate by the subsequent marriage of her parents. As a legitimate person, the appellant was entitled to rely on her father's citizenship. The appellant had properly made her claim for citizenship and this was an appropriate and suitable case for the grant of the declaratory order sought. The appellant had fulfilled the requirements of art 14(1)(b) read with s 1(a) of Part II of the Second Schedule of the FC.

SUBMISSIONS

[26] In the present appeals, the learned senior federal counsel ('SFC') on behalf of the Attorney General's Chambers ('AGC') contended that the High Court had misdirected itself in fact and in law in failing failed to take into account and to appreciate that based on art 14(1)(b), art 31 read together with s 1(a) and (e) Part II of the Second Schedule and s 17, Part III of the Second Schedule of the FC, the respondents do not possess the requisite qualifications to acquire citizenship by operation of law.

[27] The SFC argued that in light of art 14(1)(b) and s 1(a), Part II of the Second Schedule of the FC, the concept of citizenship by operation of law is premised on a combination of both *jus soli* and *jus sanguinis* principles whereby citizenship of a person is traceable to the place of birth, namely Malaysia, as well as Malaysia citizenship of at least one of the person's parents (right of blood) at the time of the person's birth (see Court of Appeal's decision in *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 MLJ 308; [2017] 7 CLJ 33; [2018] 2 MLRA 406 (CA)).

[28] According to the SFC, the Court of Appeal's decision in *Madhuvita* could no longer stand in light of the majority decision of the Federal Court in *CTEB.* Based on the Federal Court's majority decision in *CTEB*, it was contended that acquisition of citizenship by operation of law requires the fulfilment of the requisite conditions at the time of birth and not thereafter. The subsequent marriage of the parents did not change the birth status of the child as an illegitimate child.

[29] Further, it was argued by the SFC that the Legitimacy Act 1961 is not relevant in determining the citizenship of the child. There is no express provision under the Legitimacy Act 1961 to deem the legitimated child as having been born to a lawful parent at the time of birth for the purpose of his citizenship by operation of law. The Legitimacy Act 1961, being a subsidiary legislation *qua* the FC, could not be interpreted in such a way as to augment what appeared to be a perceived lacuna in the FC.

[30] The Legitimacy Act 1961 is not competent as a legal instrument to confer citizenship status to a legitimated child under art 14(1)(b) read with s (1)(a), Part II of the Second Schedule of the FC. As such, an illegitimate child born within the Federation shall inherit the citizenship of his biological mother pursuant to art 31 and s 17, Part III of the Second Schedule of the FC.

[31] The nub of the SFC's contention is that pursuant to art 14(1)(b) and s 1(a), Part II of the Second Schedule of the FC, in order to qualify for a citizenship by operation of law, these conditions have to be met namely:

(a) the child must be born on or after Malaysia Day;

(b) the child was born within the Federation; and

(c) the child's parents one at least is at the time of the birth either a citizen or permanently resident in the Federation.

[32] However, in case of *an illegitimate person*, those conditions *shall be read differently* and they shall be as follows:

(a) the child must be born on or after Malaysia Day;

(b) the child was born within the Federation; and

(c) *the child's mother* is *at the time of the child's birth* either a *citizen* or *permanently resident* in the Federation.

[33] The *basis for the difference* between an illegitimate person or otherwise could be found in art 31 and s 17, Part III of the Second Schedule of the FC. Article 31 which is placed under Part III of the FC reads:

> Until Parliament otherwise provides, *the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part*.

[34] Section 17, *Part III* of the *Second Schedule* reads:

> For the purposes of Part III of this Constitution *references* to a person's father or to his parent, or *to ONE OF HIS PARENTS*, are in relation to a person who is *illegitimate* to be construed as *references to his mother*, and accordingly s 19 of this Schedule shall not apply to such a person.

[35] Relying on the provisions discussed above, the phrase in s 1, Part II of the Second Schedule of the FC 'whose parents one at least' *must be substituted with the word* 'mother'. This was comprehensively discussed and determined by the Federal Court in *CTEB*, where it was held by the majority as follows:

(1) The child in the present appeal was born outside the Federation, hence art 14(1)(b) of the FC applied to him. Article 14(1)(b) *refers to the requisite qualifications specified in Part II of the Second Schedule*. Under Part II of the

Second Schedule, s 1 lists five situations to qualify for a citizenship pursuant to art 14 which are in s 1(a) to (e). Section 1(b) Part II of the Second Schedule, ipso facto, calls into operation the provisions pertaining to citizenship under Part III. Section 17 *opens with the words 'For the purposes of Part III'.* Therefore, in whichever way one looks at it, *s 17 could not be detached from s 1(b). Ignoring the application of s 17 would also render art 31 of the FC as otiose* (paras 38–39 & 43).

(2) Section 17 provides for reference to the 'father' of an *illegitimat e child to refer to his 'mother'. The only clear meaning to be concluded therefore is that the child's citizenship follows that of his mother*. There is nothing ambiguous about s 17 to permit other rules of interpretation. *From the express distinction for parents or father of an illegitimate child in s 17, it is obvious that the word 'parents' in the context of Part III of the FC must be construed to refer to lawful parents in a recognised marriage in the Federation*. This country never legally recognised unwedded parents. Proper distinctions have always been made in our legislation in order to differentiate between the status of 'parents' in a recognised marriage or otherwise. *Even under s 13 of the Births and Deaths Registration Act 1957, the legislation makes a clear distinction between a father or mother of an illegitimate child. This connotes that 'parents' refers alw ays to legally w edded parents, not to a biological father and mother* (paras 44–45)

(3) *The relevant provisions relating to the citizenship by operation of law in the FC must be read as a whole and to be given a straightforward plain meaning. It is improper to interpret one provision of the FC in isolation from the others*. Especially so, when the clauses indeed are written to be subjected to the other. *To half read the provision by ignoring that s 1 must be read 'Subject to the provisions of Part III' is to deny the clearly express terms of the FC*. The FC must always be considered as a whole so as to give effect to all its provisions. The fundamental rule in interpreting the FC or any written law is to give effect to the intention of the framers. The court could not insert or interpret new words into the FC. The court may only call in aid other canons of construction where the provisions are imprecise, protean, evocative or could reasonably bear more than one meaning. *Section 17 is plain and clear in its meaning. The court should not endeavour to achieve any fanciful meaning against the clear letter of the law* (paras 46–48).

[36] On the other hand, the respondents relied mainly on the two findings of the Court of Appeal in *Madhuvita* namely:

(a) the legitimacy of the applicant should be questioned *at the time of the consideration of his application* and not some other point in time; and

(b) it is *the prevailing status of legitimacy* or *illegitimacy status of the applicant* which *should be the relevant consideration* in such application.

[37] For ease of reference, the relevant excerpts of the Court of Appeal's decision in *Madhuvita* are hereby reproduced as follows:

A [61] The next consideration is whether the above conclusions are now qualified by the interpretation provisions in Part III of the Second Schedule. It is our respectful view that it is not. To recapitulate, s 17 provides that in relation to a person who is illegitimate, a reference to that person's father or parent is to be construed as a reference to the person's mother. The reason why we say that s 17 does not alter the B above interpretation is because *s 17 only applies to a person who is illegitimate*. *Section 17 is drafted in the present tense and it is the prevailing status of legitimacy or illegitimacy which is the relevant consideration*.

[65] With the clear terms of s 4, the appellant is rendered legitimate by the subsequent marriage of her parents and that legitimation is from the date of the C marriage, that is, from 23 January 2006. *From the language and terms of s 17, the appellant's legitimacy or illegitimacy is questioned at the time of the consideration of the application, and not some other point in time*.

[66] As a legitimate person from 23 January 2006, *s 17 does not apply*. *Section 17 only applies where the person is illegitimate. Since there is legitimation of the appellant*, *s 17 D does not apply*. As a legitimate person, the appellant is entitled to rely on her father's citizenship in which case, the appellant has quite clearly fulfilled the requirements of art 14(1)(b) read with s 1(a) of Part II of the Second Schedule.

[38] However, as conceded by counsel for all the respondents, the Court of E Appeal's decision in *Madhuvita could no longer stand* in light of the majority decision of the Federal Court in *CTEB*. Thus, based on the majority decision of the Federal Court, citizenship by operation of law *shall be determined at the time of birth* and not thereafter. As such, *acquisition of citizenship by operation of law requires the fulfilment of the requisite conditions at the time of birth* and not F thereafter. The subsequent marriage of the parents would not change the birth status of the child as an illegitimate child.

OUR DECISION

G **[39]** It is clear that the High Court in each of the OS application had relied on *Madhuvita* and ruled in favour of the applicants (respondents before us). At the material time, the decision of the Federal Court in *CTEB* had not been delivered. In *CTEB*, the Federal Court (by majority) clearly and unequivocally rejected the proposition that was established by the Court of Appeal in H *Madhuvita* in regards to the role of the order made under the Legitimacy Act 1961 or the subsequent legitimation of marriage of the parents for purposes of determining the question whether a child has the requisite qualifications to attain citizenship by operation of law.

I **[40]** In *CTEB*, Her Ladyship Rohana Yusuf PCA (speaking for the majority) said:

[63] The appellants' argument that the child's birth status has been altered by virtue of his legitimation via s 4 of the Legitimacy Act and that his legitimacy status for the purpose of s 17 of Part III of the Second Schedule is to be taken at the time of the

application for citizenship, *amounts to introducing words into the provision of the FC against the express wordings of* art 14(1)(b) *read together with the Second Schedule*.

[64] This has been the interpretation of these clauses on the laws on citizenship by operation of law, adopted in all the reported cases thus far *except* in the Court of Appeal case of *Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v Augustin Lourdsamy & Ors* [2018] 1 MLJ 307; [2018] 4 CLJ 758 ('Madhuvita').

[65] *Madhuvita parted ways from all the reported cases on the subject both in the High Court as well as the Court of Appeal* … . The Court of Appeal had granted citizenship by operation of law to an illegitimate child pursuant to art 14(1)(b) read together with s 1(a) and/or (e) of Part II of the Second Schedule of the FC.

[66] In arriving at its decision in *Madhuvita*, the Court of Appeal concluded that the word 'parents' under art 14(1)(b) read with s 1(a) of Part II of the Second Schedule is not qualified by the word 'lawful', 'natural', 'biological', 'adopted', 'surrogate' or any other description or adjective. As such, it includes biological parents. The fact that her parents were not married at the time of her birth does not alter or diminish their capacities as her parents. Hence, it did not need to rely on the interpretation provision in s 17 of Part III of the Second Schedule of the FC.

[67] *Madhuvita* distinctly differed from all other decisions in respect of two mains issues:

(a) that the legitimacy or otherwise of a child is to be considered at the time of the application; and

(b) the word 'parents' in s 1(a) of Part II of the Second Schedule refers to the capacity of 'parents' unqualified in any manner or form by the word 'lawful', 'natural', 'biological', 'adopted' or even 'surrogate', or any other description or adjective.

[68] With respect, *I am not in agreement with Madhuvita in relation to the finding that the legitimacy or otherwise of a child is to be considered at the time of the application. The interpretation of the word 'parents' given by Madhuvita had also gone against all the other authorities.* The word 'parents' in s 1(a) is not defined in the FC. As such, we will have to rely on the plain and ordinary meaning of the word. *Black's Law Dictionary Abridged* (6th Ed) (Centennial Edition 1891–1991) defines the word 'parent' to mean 'the lawful father or mother of a person'. Therefore, *in defining the word parents' in s 1(a) giving a plain and ordinary meaning must refer to lawful parents. In the same light, the word 'father' in s 1(b) must also refer to a father in a valid marriage*.

GRAMMATICAL CONSTRUCTION

[69] ...

[70] Madhuvita considered the time of the application as the determining point of time for the qualification of the acquisition of citizenship by operation of law and that the interpretation in s 17 becomes inapplicable in interpreting the legitimacy status of a child who at the time of the application is legally legitimised ...

[71] I am not able to reconcile para 62 of the grounds of judgment above as to *how a child born to unmarried parents is not illegitimate but yet he is a child born out of*

wedlock. If so, *why do you then need to legitimise a child who is not illegitimate but born out of wedlock*.

[72] *The grammatical construction employed in the case defies the basic premise that citizenship by operation of law requires no application nor consideration to be exercised by the Government* as I have earlier alluded to. As rightly pointed out by learned author, Emeritus Professor Datuk Dr Shad Saleem Faruqi in his book *Our Constitution* (Sweet & Maxwell, Thomson Reuters 2019) at pp 178 and 179 in respect of citizenship by operation of law:

> *Birth and descent:* This type of citizenship is also referred to as citizenship by operation of law. Its complex details are found in art 14(1)(a) and the Second Schedule, Part 1. *It confers an automatic right of citizenship without oath and without any official discretion on the following categories of persons.* (Emphasis added.)

[73] *The relevant point of time to determine the legitimacy or otherwise of a child as enunciated in Madhuvita contravenes the concept of jus soli and jus sanguinis*. This issue was articulated in the decision of the Court of Appeal in *Pang Wee See*, where Abang Iskandar JCA (as he then was) observed as follows:

> [29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of *jus soli* and the concept of *jus sanguinis*. *Jus soli* which means 'right of the soil', and commonly referred to as birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship. The determining factor being the place or territory where a person was born.
>
> *In the case of jus sanguinis, which in Latin means 'right of blood', is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state*. Viewed from the context of these two concepts, we are of the considered opinion that art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution is a provision which is anchored on the elements of both the concepts of *jus sanguinis* and of *jus soli*, whereby *citizenship of a person is traceable to the place of birth namely, Malaysia, as well as Malaysian citizenship of one of the person's parents (the right of blood) at the time of the person's birth, in order to be a Malaysian citizen by operation of law, under art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution.* (Emphasis added.)

[74] Learned counsel emphasised *when a statutory provision is drafted in the present tense, it is intended that a person's legal status is to be determined as at the present time when a right is asserted* (see *Minister of Public Works of the Government of the State of Kuwait v Sir Frederick Snow and Partners* [1984] AC 426; *Maradana Mosque Board of Trustees v Mahmud* [1966] 1 All ER 545; *Hamed v R* [2012] 2 NZLR 305; *SA Venkataraman v The State* [1958] AIR 107). Thus, by virtue of s 4 of the Legitimacy Act, the child is not illegitimate at the time of his application for citizenship.

[75] *The grammatical construction suggested by learned counsel relying on all the cases cited above are out of context. These cases do not deal with matters relating to jus soli and jus sanguinis*. No doubt they are appropriate for the grammatical construction in their own context.

[76] Besides defying the basic premise that citizenship by operation of law requires no application, the grammatical construction suggested is wholly irrelevant for yet another reason. *Between the grammatical interpretation approach and the legislative history of the constitutional provisions, the latter outweighs the former. Legislative history plays an important role in interpreting and understanding the context of a constitutional provision* (see *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 5 CLJ 569).

[41] Obviously, before the decision of the Federal Court in *CTEB* was delivered, there were two conflicting decisions of the Court of Appeal, namely *Madhuvita* and *CTEB* (CA). However, that controversy or conflict has since been (somewhat) settled by the majority decision of the Federal Court in *CTEB* which had clearly and unequivocally posited that it is the legitimate or illegitimate status of the child 'at the time of birth' that matters. Thus, the subsequent marriage of the illegitimate child's parents or the order of legitimacy under the Legitimacy Act 1961 are irrelevant.

[42] At the outset of the hearing of the appeals before us, we asked counsel whether in light of the Federal Court's decision in *CTEB*, *Madhuvita* is still good law. Counsel for all the parties said that *Madhuvita* has been overruled by the Federal Court in *CTEB* and *Madhuvita* is no longer good law in light of the pronouncement to the contrary by the Federal Court in *CTEB*. Of course, counsel for the respondents endeavoured to argue that despite the demise of the Court of Appeal's ruling in *Madhuvita*, there was still scope for the argument that the respondents in the appeals had the requisite qualifications for citizenship by operation of law.

[43] We were not convinced with the arguments that were made by counsel for the respondents in the respective appeals in their effort at getting around the *CTEB* ruling. Rather, we agreed with the SFC that this court is bound by the decision of the Federal Court in *CTEB*. As far as we were concerned, all the three appeals have more or less the same set of facts ie the respondents sought declaration of citizenship by operation of law under art 14(1)(b) of the FC and they were illegitimate at the time of birth. Thereafter (in Appeals 321 and 322) they claimed legitimacy consequent upon the subsequent marriage of their parents via orders of legitimacy under the Legitimacy Act 1961.

[44] The decision of the High Courts in all the three appeals, is indisputably anchored on the Court of Appeal's decision in *Madhuvita* which ruled that the status of respondents' legitimacy is to be determined at the time of application for citizenship and not at the time of birth. But the Federal Court by majority in *CTEB* has rejected and overruled *Madhuvita*. Since counsel for the respondents agreed that *Madhuvita* is no more a good law, it is clear that the appeals have to be allowed because we are bound by *stare decisis* ie the majority

in *CTEB*.

[45] For completeness, we should add that we did not have the benefit of arguments, in regards to the effect of the later decision by the Federal Court in *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71; [2022] 1 CLJ 1; [2021] 1 LNS 1759; [2022] 1 MLRA 185 (FC), ('CCH') where the Federal Court (speaking through the learned Chief Justice) in dealing with an appeal relating to a claim for Malaysian citizenship in respect of an *abandoned child*, referred to the 'minority' decision in *CTEB* and said [43]–[44] as follows:

> [43] Dato' Dr Cyrus Das referred us to the dissenting judgment of this court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236; [2021] 6 CLJ 471 ('CTEB') where it was stated that Part III which contains enabling provisions is meant to aid or assist in the interpretation of Parts I and II, and not to qualify or conditionalise the application of Parts 1 and II to Part III. The dissenting judgment had commented on s 19B of Part III, as follows:
>
> > [161] Both ss 19A and 19B of Part III are constitutional presumptions as to births. Section 19A codifies in part the international principle of flag state jurisdiction and applies in relation to persons who are born on a vessel such that their birth there is attributed to the place of registration of the vessel. Section 19B applies in relation to children who are found abandoned in any given place such that the place of abandonment is treated as their place of birth and where their mother is also permanently resident there.
> >
> > [162] All the above sections, namely ss 17, 19, 19A and 19B exist as supplementary or filler sections — so to speak — to supplement or to close any gaps or to resolve technicalities that may arise when the person's parents' identity is in issue or even if their own place of birth is in issue so long as that is a relevant question for the purposes of Part I or Part II respectively. (Emphasis added.)
>
> [44] The principles of *jus soli* and *jus sanguinis* as well as the principles on how the FC was drafted to enable citizenship as broadly as possible while weeding out statelessness have been discussed in great length by the minority of this court in *CTEB*. *We adopt the reasoning there as part of this judgment being the only other decision of the Federal Court apart from this one, to our knowledge, to have touched on this issue most recently.*

[46] Thus, the important and imperative question is whether *Madhuvita* has been resurrected via paras [43]–[44] in *CCH*. But as we said, we did not have the benefit of arguments on this aspect of the development of the law since *CTEB*. In our view, the question of whether *Madhuvita* has been resurrected via *CCH* or otherwise has to be finally and decisively resolved and determined by the Federal Court (hopefully) in the near future.

[47] For now, it is our view that based on the doctrine of *stare decisis*, the

majority ruling in *CTEB* applies to the fact pattern presented in the instant appeals. As such, all the appeals are allowed and we set aside the decisions of the High Court in respect of each of the appeals. Consequently, the applications via each of the originating summons in the High Court are dismissed. We made no order as to costs (here and below).

Appeals allowed; decisions of High Court set aside with no order as to costs.

Reported by Dzulqarnain Ab Fatar